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Diplomatic protection

Diplomatic protection

Report of the Secretary-General

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I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.[1] In resolution 61/35 of 4 December 2006, the General Assembly took note of the draft articles on diplomatic protection. The Assembly also invited Governments to submit their comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles.

2. By a note verbale dated 18 December 2006, the Secretary-General invited Governments to submit, no later than 1 June 2007, their written comments concerning the recommendation by the Commission to elaborate a convention on the basis of the draft articles on diplomatic protection.

3. As at 29 June 2007, the Secretary-General had received written comments from Argentina, Austria, Brazil, Cuba, the Czech Republic, India, Lebanon, Norway (on behalf of the Nordic countries), Portugal, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Those comments are reproduced below.

II. Comments and observations received from Governments

Argentina

[Original: Spanish]
[19 June 2007]

The Permanent Mission of the Argentine Republic to the United Nations ... expresses the support of the Government of Argentina for the International Law Commission's recommendation that a convention should be elaborated on the basis of the draft articles.

Austria

[Original: English]
[11 June 2007]

Austria reiterates its congratulations to the International Law Commission for the adoption on second reading of the draft articles on diplomatic protection, a major achievement of the last quinquennium. Austria would like to refer generally to its comments on the draft articles as expressed in its statement before the Sixth Committee on 23 October 2006, during the sixty-first session of the General Assembly.[2]

With regard to the proposal of the Commission to elaborate a convention on diplomatic protection, Austria is not convinced of the usefulness of starting immediately with this project. The text adopted on second reading was elaborated in a very short time and it is necessary for States to have some time to reflect on the

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49.

[2] See A/C.6/61/SR.9, paras. 66-68.

result. Austria, therefore, would prefer to wait and place this item again on the agenda in a few years, in order to assess the possibility for taking the necessary steps towards the elaboration of a convention by convening an ad hoc committee, a preparatory committee or a codification conference. That would give States the opportunity to consider further the contents of the draft articles.

Brazil

[Original: English]
[31 May 2007]

The Brazilian Government is in agreement with the recommendation that the General Assembly elaborate a convention on the basis of the articles drafted by the International Law Commission on diplomatic protection.

The Brazilian Government is of the opinion that such a convention would represent a valuable exercise in addressing existing gaps in international law and would promote its updating.

Cuba

[Original: Spanish]
[30 May 2007]

Cuba is grateful to the Special Rapporteur, Christopher Dugard, for the results achieved in drawing up the draft articles on diplomatic protection and expresses its agreement with the Commission's recommendation to elaborate a convention on the basis of the draft articles on diplomatic protection, taking into account that the adoption of an instrument on that subject would incorporate into the text generally accepted practice, as derived from the judgments of the International Court of Justice and the customary practice of States.

Cuba considers that a convention based on the draft articles would contribute to the codification and progressive development of a set of rules governing the conditions for submission of a request for diplomatic protection and recognizing the right of the State to invoke, through diplomatic action or other means of peaceful settlement, the responsibility of another State for any injury caused by an internationally wrongful act by that State to a natural or legal person who is a national of the State invoking that responsibility. Accordingly, diplomatic protection exercised by a State at the inter-State level continues to be an important remedy for the protection of persons whose rights have been violated abroad.

For Cuba, diplomatic protection is a major advance in the protection of human rights and fundamental freedoms flowing from international law. The draft articles submitted recognize the applicability of a diplomatic protection regime to refugees and stateless persons, which would contribute to the protection of their rights.

Cuba recommends that the draft articles proposed by the International Law Commission should be submitted for study to a working group, within the framework of the Sixth Committee, so that it may finalize the details of the future convention on diplomatic protection, with a view to improving the text and securing greater acceptance for it by Member States.

Czech Republic

[Original: English]
[25 May 2007]

The Czech Republic is inclined to conclude that, at least at this stage, it is not necessary to adopt a legally binding international convention based on the draft articles on diplomatic protection, and that, even in their non-binding form, the articles on diplomatic protection could adequately serve the purpose of consolidating the rules in this sphere of international law and shaping the relevant State practice. The Czech Republic also believes that, at this stage, the non-binding form of the draft articles may, in certain respects, be more useful than the classical form of an international convention.

The Czech Republic is of the view that, if the articles remain in their non-binding form, there will be more room for consolidating and possibly developing some of the elements of diplomatic protection contained in them through State practice and the decisions of international judicial and arbitration bodies. That would also rule out the possibility that the potential convention on diplomatic protection would be deprived of some of the progressive elements that appear in the current draft articles but might not immediately gain the universal support of the international community, and the possibility that the potential convention would be ratified by only a small number of States, which might weaken the legal regime of diplomatic protection enshrined in it.

The Czech Republic further believes that the fate of the draft articles on diplomatic protection is closely bound up with that of the articles on responsibility of States for internationally wrongful acts, adopted on second reading by the International Law Commission at its fifty-third session, in 2001. The Czech Republic is led to this conclusion chiefly by a connection and a similarity, in terms of both substance and nature, between the draft articles on diplomatic protection and the articles on responsibility of States for internationally wrongful acts. Accordingly, the Czech Republic is of the opinion that the final form of the draft articles on diplomatic protection should correspond to the final form of the articles on responsibility of States for internationally wrongful acts. In this respect, the Czech Republic refers to its statement,[3] expressing the view that the draft articles on responsibility of States for internationally wrongful acts should, at least at this stage, remain in their non-binding form.

India

[Original: English]
[31 May 2007]

India supports the recommendation of the International Law Commission that the draft articles on diplomatic protection be considered for adoption as a convention, which would be of a binding nature and provide legal certainty on the applicable rules.

[3] See A/62/63.

Lebanon

[Original: Arabic]
[29 May 2007]

Having examined the text of the draft convention on diplomatic protection studied by the International Law Commission and the letter of explanation subsequently attached, Lebanon is of the opinion that there is no legal obstacle to proceeding with the said draft, inasmuch as its articles do not conflict with the binding provisions of Lebanese law relating to public order, notwithstanding the linguistic observations expressed by the panel, particularly with regard to the lack of clarity of certain expressions and the weak sentences.

Norway (on behalf of Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]
[25 May 2007]

The Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, once again commend the International Law Commission for the adoption in 2006 of the draft articles on diplomatic protection.

The draft articles meet the general satisfaction of the Nordic countries. In their view, the draft articles strike a balance between the codification and the progressive development of international law in the field of diplomatic protection.

The Nordic countries are of the view that the General Assembly should follow the recommendation of the International Law Commission and, in a relatively short time, adopt the draft articles in the form of a convention. A convention on diplomatic protection would enhance legal clarity and predictability in this important field of law.

In order to enhance future discussion on this very important topic, we see merit in including the item on the agenda of the General Assembly until a future convention on diplomatic protection has been elaborated.

Portugal

[Original: English]
[31 May 2007]

Portugal would like to congratulate once again the International Law Commission on its work and, in particular, to commend the Special Rapporteur, John Dugard, who guided the Commission throughout this exercise.

The completion of 19 draft articles on diplomatic protection in less than 10 years since the topic was first identified as suitable for codification and progressive development proves that the topic was indeed ripe and adequate for that purpose and that it is an issue of great relevance and usefulness in contemporary international relations.

Portugal welcomes this development and the recommendation by the Commission for the elaboration of a convention on the basis of the draft articles.

The Portuguese Republic is in agreement with the draft articles in general and with their suitability for an international convention, regardless of the fact that, during the debates of the Sixth Committee when the topic was discussed, we voiced disagreement with regard to certain aspects concerning both the scope of the draft articles and its particular contents, namely the high threshold set by draft article 8 and draft articles 11 and 12 on the protection of shareholders as autonomous subject of diplomatic protection.

It is our view that an ad hoc committee within the framework of the Sixth Committee could be established with a mandate to elaborate an international convention on diplomatic protection on the basis of the draft articles adopted by the Commission.

Our hope is that soon, together with the draft articles on State responsibility, the draft articles form part of parallel conventions, since they traditionally go hand in hand, as recognized by the Commission itself. This would represent a major step towards the consolidation of the law on international responsibility.

Russian Federation

[Original: Russian]
[22 June 2007]

In the view of the Russian Federation, the draft articles on diplomatic protection represent the successful outcome of years of work by the International Law Commission to clarify the rules concerning one of the most important institutions in international law. Given the complexity and urgency of the matters governed by the draft articles and the balance struck in addressing them, the Russian Federation believes that the end product of the Commission warrants adoption by the General Assembly in the form of a convention.

Diplomatic protection has traditionally played an important role in ensuring that States meet their international legal obligations to observe the rights of individuals and entities of other States. Furthermore, the draft articles prepared by the Commission significantly codified the already established rules of customary international law. In addition, the exercise of diplomatic protection by States has often raised complex legal questions, which have been taken up in well-known international cases (for example, the case of the Mavrommatis Palestine Concessions before the Permanent Court of International Justice and the Nottebohm case before the International Court of Justice).

The adoption of the draft articles in the form of a convention could further clarify the rules on diplomatic protection and provide a place for the final product of the Commission among the universally recognized rules of customary international law.

Of course, some States continue to criticize many of the draft articles on diplomatic protection. This was evident in particular during the discussions of the report of the Commission (A/61/10) in the Sixth Committee during the sixty-first session of the General Assembly. Moreover, the draft articles contain provisions

constituting recommendations (this applies especially to draft article 19) which would not be quite appropriate to include in a legally binding document.

In the light of the foregoing, if the prevailing opinion of States is against the adoption of a new universal convention, the Russian Federation would not object to a General Assembly resolution drawing attention to the end product of the Commission in the form of draft articles.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[8 January 2007]

The Government of the United Kingdom of Great Britain and Northern Ireland extends its appreciation to the members of the International Law Commission, and in particular to the Special Rapporteur, John Dugard, for their valuable efforts on the topic of diplomatic protection. This matter is of considerable importance to Governments, and we welcome the adoption on second reading by the Commission of the draft articles on diplomatic protection and the commentaries thereto.

As is evident from the commentaries to the draft articles, there exists a large body of well-established State practice on much of the subject matter covered by the draft articles. The topic has been largely characterized by customary international law, with development achieved through State practice and the decisions of international courts and tribunals. In addition, the draft articles are, in many respects, largely consistent with our own claims rules, which were provided to the Commission during the course of its study.

However, as the United Kingdom has noted on a number of occasions, there are also important elements of the draft articles that constitute a progressive development of the law, for example, draft article 8 on the diplomatic protection of Stateless persons and refugees. While the United Kingdom may be willing to accept some of those elements as a desirable direction for the development of customary international law, it is not so comfortable with other aspects. In particular, it is concerned with the inclusion of the new article 19, entitled "recommended practice". It is the view of the United Kingdom that the inclusion of that article risks undermining well-established rules of customary international law. We understand that other delegations share our concern.

We note the recommendation of the Commission that Governments move towards the adoption of a convention based on the text of the draft articles. That text was only recently made available to Governments, and we have not had sufficient time to study the text and the commentaries thoroughly. Nor have the draft articles been considered fully by other Government departments, even though the draft articles may have important implications. To the extent that such departments have considered the draft articles, some serious concerns have been raised.

As a separate matter, and in addition to our concerns regarding the substance of the draft articles, there is the issue of the linkage between the draft articles and the articles on the responsibility of States for internationally wrongful acts. We note the observation of the Special Rapporteur that the fate of the draft articles on diplomatic protection is closely bound up with that of the articles on State responsibility. We concur in that assessment. As such, it would be premature to

determine that the draft articles on diplomatic protection should form the basis of a convention, when there is as yet no consensus that the articles on State responsibility will be elaborated in a treaty form.

In these circumstances, the United Kingdom considers that a move at this stage to elaborate a convention would be unhelpful, as it would risk opening up the debate on the draft articles and undermine the very important consolidating work that has already been undertaken by the Commission on this topic. Given the difference of opinion among Member States on certain aspects of the draft articles, it is possible that a significant number of States might not ratify a convention based on the text of the draft articles, an outcome that would reduce the legal standing and influence of the draft articles.

In the view of the United Kingdom, the development of the law in this area would be best served by a period of further reflection on the text of the draft articles and commentary. The United Kingdom would ask the General Assembly to adopt a resolution in which it notes the draft articles, with the text to be annexed to the resolution, and to defer the decision on the future of the draft articles until 2012. This would allow States and other bodies to become familiar with the draft articles and to draw on them in their present form. The draft articles could then enter into international law through State practice, the decisions of international courts and tribunals, and academic writings. Previous versions of the draft articles and the commentaries have already received attention from both international and domestic courts, including those of the United Kingdom. It would also allow the Assembly to take a decision on the future of the articles on State responsibility prior to a decision on the fate of the draft articles.

The United Kingdom does not consider that standing back from the elaboration of a convention at this point will undermine the authority and importance of the Commission's contribution to the topic. We believe it important that the Commission adopt creative and flexible approaches to the final form of the work on a topic: we do not agree with the view that the work of the Commission must ultimately take the form of a convention to be "complete". In the view of the United Kingdom, it is a question of judgement as to what approach best serves the development of the law in this area and ensures the proper reception of the principles elaborated in the most positive and secure manner.

United States of America

[Original: English]
[21 May 2007]

The Government of the United States of America appreciates the work of the members of the International Law Commission, in particular that of the Special Rapporteur, John Dugard, for their valuable contribution to the realm of diplomatic protection. The subject is an important one and we welcome the adoption on second reading by the Commission of the draft articles of diplomatic protection and the commentaries thereto.

The United States does not believe that it would be advisable to attempt to adopt a binding instrument on this topic. There is a large body of well-established

State practice pertaining to many of the issues covered by the draft articles. For this reason, our comments will only highlight a few key issues.

The United States welcomes the changes made by the Commission over the past year to a number of the provisions in preliminary drafts of the articles to reflect more accurately customary international law and to clarify expressly that some articles, such as article 8, represent a progressive development of the law.[4] For example, we think it is useful that paragraph 8 of the commentary on draft article 1 makes clear that diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action. We also note that paragraph 2 of the commentary to draft article 2 reaffirms that a State is under no obligation to exercise diplomatic protection, since the question of whether to espouse claims is a sovereign prerogative, the exercise of which necessarily implicates other considerations of national interest.

The United States is pleased that the formulation by the draft articles of the principle of exhaustion of remedies, taking into account the commentary, is in substantial conformity with the customary law rule. Specifically, the United States takes the position that, under customary international law, local remedies do not have to be exhausted where the local remedies are obviously futile or manifestly ineffective, a formulation that conveys the same substance as draft article 15(a). Moreover, paragraph 4 of the commentary correctly elaborates that neither a low possibility of success nor the difficulties and costs of further appeals are sufficient and that the test is not whether a successful outcome is likely or possible, but whether the municipal system of the respondent State is reasonably capable of providing effective relief. Draft article 15(d) provides that local remedies do not have to be exhausted where the injured person is manifestly precluded from pursuing local remedies. Paragraph 11 of the commentary makes clear that this is an exercise in progressive development that must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies, but that he is "manifestly" precluded from pursuing such remedies. Paragraph 14 of the commentary to draft article 14 on exhaustion of domestic remedies also clarifies that exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.

The United States believes that certain other provisions of the articles deviate from the State practice representing customary international law without a sufficient public policy rationale. Our comments on these provisions are grouped into four categories: continuous nationality and the *dies ad quem*; extinct corporations; protection of shareholders; and draft article 19 on "recommended practice".

[4] Article 8 is not reflected in customary international law, particularly in terms of its definition of "refugee", which is without any legal foundation.

Continuous nationality and the *dies ad quem*

The draft articles honour the established principle of continuity of nationality[5] as a prerequisite to the exercise of diplomatic protection on behalf of natural and corporate persons in articles 5 and 10 and, by implication, in articles 7 and 8. We note that this continuity of nationality between two dates is required by customary international law, not a progressive development of the law as stated in paragraph 2 of the commentary to draft article 5. What is a progressive development of the law, however, is setting the date of the official presentation of the claim as the *dies ad quem*. This approach diverges from customary international law in that it does not extend the requirement of continuity of nationality beyond the date of official presentation of the claim to the date of resolution, except in cases where, subsequent to presentation, the injured person acquires the nationality of the respondent State or, as stated in the commentary, acquires the nationality of a third State in bad faith. Our view is that the customary international law rule is that reflected in the clear record of State practice and in the most recent articulation of the rule that appears in the award of the arbitral tribunal in the case of *The Loewen Group Inc. v. United States of America*. The Tribunal in that case stated, "[i]n international law parlance, there must be a continuous national identity from the date of the events giving rise to the claim ... through the date of the resolution of the claim ...". The commentary cites no convincing authority that nationality at both the date of injury and the date of official presentation of the claim is sufficient, but instead finds that requiring nationality to be maintained to the date of resolution of the claim "could be contrary" "... the interests of the person suffering the injury. It thereby treats the date of the official presentation of the claim as the *dies ad quem* as a policy decision, not one grounded in customary international law.

Extinct corporations

Draft article 10(3) provides for a State to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation. Draft article 11 creates two exceptions to the general rule that only the State of incorporation may exercise diplomatic protection in respect of claims of that corporation, one of which is for an injury to an extinct corporation. Specifically, draft article 11(a) would allow the States of nationality of shareholders to exercise diplomatic protection with respect to claims arising from injuries to a corporation where "the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury". As we explained in our comments of 28 December 2005 on the draft articles,[6] the United States has

[5] Some of the limitations on claiming nationality for purposes of diplomatic protection are set forth in the commentaries. For example, paragraph 13 of the commentary to article 2 provides that, if the injured person has in bad faith retained that nationality until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated. Although article 5(2) provides that a State may exercise diplomatic protection under certain circumstances in respect of a person who was not its national at the date of injury, paragraph 10 of the commentary makes clear that this exception will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim. Paragraph 1 of the commentary to article 10 notes that corporations generally change nationality only by being re-formed or reincorporated in another State, in which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.

[6] See A/CN.4/561.

reservations about articles 10(3) and 11(a). First, the articles neither reflect customary international law nor have a rational basis for their existence. For example, although the commentary to draft article 10(3) characterizes the issue as one that troubled four judges in the *Barcelona Traction* case, other than the separate opinion of Judge Gros, the opinions do not address the issue of the State of incorporation's right to pursue a claim on behalf of a defunct corporation.[7] Furthermore, Judge Gros does not suggest that the State's right of espousal should last in perpetuity, as contemplated by draft article 10(3). Further, despite the suggestions to the contrary in paragraphs 2 to 7 of the commentary to draft article 11, the International Court of Justice left the questions set forth in draft article 11 very much undecided in its judgment of 5 February 1970 in the *Barcelona Traction* case, since the circumstances for their consideration did not arise in the case.

Second, the articles expand the rights of succession beyond those provided for in the law of the State of incorporation. For example, draft article 11(a) creates the anomalous situation of granting States of shareholders a greater right to pursue claims of a corporation than the State of incorporation itself provides to the shareholders. Furthermore, draft article 10(3) undermines the benefits of finality inherent in municipal survival and corporate wind-up statutes. Third, not only may the articles result in a change in the nationality of the claim after a corporation becomes extinct, depending on whether draft article 10(3) or draft article 11(a) is operative, but draft article 11(a) could result in multiple States of shareholders espousing the same injury to the corporation.

Protection of shareholders

Draft article 12 restates the customary international law rule that a State of nationality of shareholders can exercise diplomatic protection on their behalf when they have suffered direct losses. Although the commentary to draft article 11 provides in paragraph 1 that only "where the act complained of is aimed at the direct right of the shareholders does the shareholder have an independent right of action", citing to paragraph 47 of the *Barcelona Traction* case, that sentence (read in the context of paragraph 47) is setting forth one example of a type of action that would result in infringement of a right of the shareholder. Paragraph 47 makes it clear that intent is not necessarily a prerequisite to a direct infringement of a right of the shareholders. Rather, the correct standard is the one articulated in draft article 12 itself: whether the shareholders have suffered direct losses. Shareholders may suffer direct losses even when the action is not "aimed" at their direct rights.

The United States does not believe that draft article 11(b) reflects customary international law. Draft article 11(b) provides for the State of nationality of shareholders to espouse corporate claims where the corporation has the nationality

[7] Jessup sep. op. at 193 (opining that a State may extend diplomatic protection to shareholders who are its nationals where the State of incorporation has liquidated or wound up the corporation after the injury was inflicted by some third State; does not address the rights of the State of incorporation); Gros sep. op. at 277 ("[I]f the company's State had started an action it could not be nonsuited through the disappearance of the company. And even if such action had been instituted after the disappearance of the company, it is difficult to see why the State of the company should be unable to make a claim in respect of the unlawful act which was the root cause of the disappearance."); Fitzmaurice sep. op. at 101-02 (questioning need for continuity of nationality after date of injury); Riphagen dissent (demise of corporation irrelevant since right of diplomatic protection of shareholders is independent right).

of the State causing injury to it, and incorporation under the law of that State is required as a precondition for doing business there. As explained in our comments of 28 December 2005, the commentary does not provide persuasive authority for this proposition. All of the cases provided by the commentary as evidence for this exception were based on a special agreement between two States granting a right to shareholders to claim compensation, or an agreement between the injuring State and its national corporation granting compensation to the shareholders. Not only was the issue not before the court in *Barcelona Traction*, but the case concerning Eletronica Sicula, S.p.A. (ELSI) involved a claim under a treaty that expressly provided for indirect claims by shareholders and thus cannot be read to support the proposition that this exception is an element of customary international law, notwithstanding the commentary's description in paragraph 11.

Article 19 on "recommended practice"

We are concerned by the inclusion of article 19 on "recommended practice", which is not appropriately placed in the articles since, as acknowledged in paragraph 1 of the commentary, they have not acquired the status of customary rules nor are they susceptible to transformation into rules of law in the progressive development of the law.[8] The fact that the commentary argues that they are "desirable practices" does not render it appropriate to place them in the text of the articles.

In conclusion, the draft articles deviate from settled customary international law on a limited set of issues. Nonetheless, it is doubtful that the expense and other burdens of a diplomatic conference are warranted. The negotiation of a convention would risk undermining the very important work that has been undertaken by the Commission on this topic, particularly if a significant number of States did not ratify the resulting convention. Instead, the United States believes that the General Assembly should adopt a resolution, in which it notes the draft articles, with the text to be annexed to the resolution. This would allow States and other bodies to draw on the draft articles in their present form, giving due account as to whether a draft article correctly codifies customary international law or constitutes an appropriate progressive development of the law.

[8] Although paragraph 1 of the commentary confirms that draft article 19 is recommendatory and not prescriptive language and paragraph 3 confirms that a State is not obliged under international law to exercise diplomatic protection, article 19(a) and (b) provide that a State entitled to exercise diplomatic protection should give due consideration to that possibility and take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought. Article 19(c) provides that a State should transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions, although paragraph 5 of the commentary confirms that the protecting State has no obligation to do so, and in any event, that it would not be inappropriate for that State to make reasonable deductions from the compensation transferred, such as to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the costs of goods or services provided by the State to them.